

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE

December 15, 2005 Session

BOBBY R. BRUNER v. ODOM CONSTRUCTION SYSTEMS, INC.

**Direct Appeal from the Circuit Court for Knox County
No. 3-566-00 Wheeler A. Rosenbalm, Judge**

Filed April 25, 2006

No. E2004-02862-WC-R3-CV - Mailed February 15, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the supreme court of findings of fact and conclusions of law. The trial court awarded Plaintiff 100 percent permanent disability. On appeal, Defendant argues (1) the trial court was in error in finding Plaintiff's headaches and depression were caused by the accident and, (2) the evidence does not support a finding of total permanent disability. The judgment is affirmed.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and THOMAS R. FRIERSON II, SP. J., joined.

J. Eric Harrison, Morristown, Tennessee, for Appellant, Odom Construction Systems, Inc.

John T. Johnson, Jr. and Laura Bradley Myers, of Knoxville, Tennessee, for Appellee, Bobby R. Bruner.

MEMORANDUM OPINION

In this case the employer, Odom Construction Systems, Inc., has appealed from the ruling of the Circuit Judge awarding Plaintiff, Bobby R. Bruner, 100 percent permanent disability.

Facts

The Plaintiff is a high school graduate without any vocational training. He is fifty years of age and has followed construction work most of his work life. He would be classified as performing

manual labor in doing framing work and hanging sheetrock. He said his work was of a heavy nature. On June 16, 1999, he picked up a big metal stud and started to hand it to a co-worker when he said it “just felt like my arm fell off.” He also felt a burning sensation running up in his neck.

As a result of the accident, he testified he sustained a shoulder injury, a hand injury and a head injury. He said the right side of his head hurts; that his memory has been affected; and he has dizzy spells.

Prior to the accident in question, he had been seen and treated for various other health problems. He had high blood pressure, knee surgery, sinus surgery, heart and back problems. Since the accident, he has been diagnosed as a diabetic.

He told the trial court he was not able to work because of his recent injuries and due to his treatment for depression. His physical activity seems to be very limited as his wife, Alma Bruner, testified he was very active prior to the accident and worked every day.

Plaintiff’s family doctor was Dr. Robert C. Alley, an internal medicine physician, who testified by deposition. The doctor stated he had been seeing Plaintiff since 1992 and since the accident, he had complaints of chronic pain and he suffered from depression. He referred him to other doctors for treatment. He said he was of the opinion he had some damage to the musculature on the right side of his neck and as a result he has chronic spasms, impingement of nerves and chronic headaches which he felt were all caused by the work-related accident. The doctor indicated Plaintiff was taking a lot of medication such as neurontin, hydrocodone and vioxx for his physical injuries and lexopr, concerta and resperdol for depression and that the depression was a result of the accident and his condition.

Dr. Alley told the court Plaintiff was a “changed man” since the accident; that he was not able to work in his old job and does not seem to be able to focus on anything longer than five or ten minutes. He said he had not improved much in the five years since the accident. With reference to impairment, he gave a 90 to 95 percent rating and said maybe it was 100 percent. At another point in his testimony, he said that to the extent of having the ability to work and have gainful employment, Plaintiff was completely disabled.

Dr. William Hovis, an orthopaedic surgeon, testified by deposition and stated he saw Plaintiff during June 1999 for his shoulder and neck complaints and performed arthroscopic surgery on his shoulder and a carpal tunnel release decompression on his right wrist. He gave a 2 percent impairment rating on the shoulder and a 5 percent impairment to the hand for a total impairment of 7 percent to the upper extremity.

Dr. Kenneth O. Jobson, a board-certified psychiatrist, treated Plaintiff for his depression and memory problems which he said was probably as a result of his chronic pain and loss of employment. Although he had other medical problems, the doctor felt the injury in question was the major factor causing his depression. As to the permanency question, the doctor replied: “I think

there is a likelihood that it's permanent, but it's difficult to know the exact probability of that." He also stated his depression was classified as moderate and that it would have a severe effect on his employability.

The only other witness to testify was Michael T. Galloway, a vocational consultant. He interviewed Plaintiff, administered certain tests and reviewed all of the medical depositions. His conclusion was that the employee had no vocational disability and he said he based that conclusion on the fact that none of the doctors imposed any medical restrictions on his ability to work. The witness said permanent medical restrictions were a key factor for an evaluator to use in assessing vocational disability.

Standard of Review

The standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). In assessing and weighing evidence, the trial court is in a better position to judge the credibility of witnesses who have given oral testimony and the appellate court must extend considerable deference to the trial court's factual findings. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729 (Tenn. 2002).

Analysis of Issues

The employer raises two questions on appeal. First, it is insisted that the trial court was in error in finding the employee's headaches and depression were caused by the accident. The second issue cites error on the part of the court in finding plaintiff was totally and permanently disabled. In our review of the record, we find very little evidence to support these contentions.

In order to award total disability benefits, the evidence must establish the disability totally incapacitates the employee from working at an occupation which brings the employee an income. Tenn. Code Ann. § 50-6-207(B). Many factors must be taken into consideration in determining whether an employee is totally disabled such as the employee's age, education, work experience, local job opportunities, etc. and this is to be examined in relation to the open labor market. *Orman v. William-Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991); *Clark v. National Union Fire Ins. Co.*, 774 S.W.2d 586, 588 (Tenn. 1989). The statutory definition of total disability focuses on an employee's ability to return to gainful employment. *Davis v. Reagan*, 951 S.W.2d 766 (Tenn. 1997).

In the present case, the medical evidence established plaintiff's chronic pain resulting from his physical injuries and his state of depression were permanent injuries caused by the accident in question. Dr. Alley testified the employee was completely disabled to the extent of working at gainful employment. Dr. Jobson was of the opinion his state of depression would have a severe impact on his employability.

Defendant employer did not introduce any medical evidence that conflicted with these

conclusions but did introduce evidence from a vocational consultant who testified the employee had no vocational disability. He reached this conclusion because the doctors failed to impose any permanent restrictions. It is true that medical restrictions were not imposed during the course of their testimony. However, a specific question of this nature was never directed to the doctors. We are somewhat perplexed by this witness's conclusion under the state of the entire record. It may be that if a doctor is of the opinion the patient is unable to work, it would be unnecessary to impose restrictions when working was unlikely. We do not give any weight to this evidence.

Conclusion

The evidence does not preponderate against the judgment entered by the trial court. The judgment is affirmed and costs of the appeal are taxed to the defendant employer.

ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Odom Construction Systems, Inc., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore overruled. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Odom Construction Systems, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Anderson, J., not participating